92-361

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JOEY V. GUTIERREZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KENNETH W. STARR
Solicitor General
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QUESTION PRESENTED

In this action for judicial review of the denial of a claim for Social Security disability benefits, the district court, in accordance with sentence four of 42 U.S.C. 405(g), held that the Secretary's decision was not supported by substantial evidence and remanded the cause to the Secretary for further proceedings. The question presented is:

Whether, in light of *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), and *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157 (1991), the court of appeals correctly held that the district court's remand order was not a "final judgment" that triggered the 30-day period for filing an application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d).

PARTIES TO THE PROCEEDING

Petitioner, the defendant below, is Louis W. Sullivan, the Secretary of Health and Human Services. Respondent, the plaintiff below, is Joey V. Gutierrez.

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In the Supreme Court of the United States

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No.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JOEY V. GUTIERREZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 953 F.2d 579. The opinions of the district court concerning attorney's fees (App., *infra*, 17a-24a, 25a-32a) are reported at 734 F. Supp. 969 and 745 F. Supp. 665, respectively. The prior opinion of the district court (App., *infra*, 33a-37a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1992. The petition for rehearing was denied on May 28, 1992. App., *infra*, 38a-39a.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides in relevant part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, * * * may obtain a review of such decision by a civil action * * *. The [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. * * * The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the rec-

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[1] By reason of a clerical error, the Secretary's timely petition for rehearing and suggestion of rehearing en banc were originally denied as untimely on April 30, 1992, without submission to the full court. App., *infra*, 40a-41a. Thereafter, the petition and suggestion were resubmitted to the full court, and on May 28, 1992, the court entered an order that amended the April 30 order and denied both rehearing and rehearing en banc. See App., *infra*, 38a-39a.

ord in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.

2. The Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), provides in relevant part:

> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action * * * brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> (B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought * * *. The party shall also allege that the position of the United States was not substantially justified. * * *
>
> * * * * *
>
> (2) For the purposes of this subsection—
>
> * * * * *

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

* * * * *

STATEMENT

1. This case involves the question of when the 30-day period for filing an application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), begins to run in a Social Security case in which the district court remands the cause to the Secretary for further proceedings pursuant to sentence four of 42 U.S.C. 405(g). In *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), the Court held that such a remand order is immediately appealable as a "final judgment" pursuant to 28 U.S.C. 1291. Under EAJA, a fee application must be filed "within thirty days of final judgment in the action." 28 U.S.C. 2412(d)(1)(B). The term "final judgment" means "a judgment that is final and not appealable." 28 U.S.C. 2412(d)(2)(G).

2. Respondent filed an application for Social Security disability benefits on July 12, 1985. The administrative law judge (ALJ) determined that respondent was not disabled, finding that he retained the ability to perform sedentary work in a low stress environment involving simple one or two step instructions. App., *infra*, 34a. The ALJ's decision became the final decision of the Secretary. Respondent then sought judicial review under 42 U.S.C. 405(g). On January 30, 1989, the district court held that the Secretary's decision was not supported by substantial evidence, and it remanded to the Secretary for further proceedings. App., *infra*, 33a-37a.

On remand, the Appeals Council found respondent disabled in a decision dated May 8, 1989. On December 12, 1989, respondent filed a motion in the district court for entry of a final judgment and an award of attorney's fees under EAJA. The district court rejected the Secretary's contention that respondent's fee application was untimely, because, in its view, no "final judgment" had yet been entered in the case. App., *infra*, 17a-24a. On May 8, 1990, the district court entered an order for final judgment that allowed respondent to renew his motion for attorney's fees. *Id.* at 26a. Respondent renewed his application, but the district court declined to award fees, finding that the position of the United States was substantially justified. *Id.* at 25a-32a.

The court of appeals reversed the district court's decision denying fees, holding that the position of the United States was not substantially justified. App., *infra*, 1a-16a. As a threshold matter, the court of appeals held that respondent's fee application was timely. *Id.* at 6a-11a. It rejected the Secretary's contention that the district court's January 30, 1989, remand order was the "judgment" in the action, and that the 30-day period for filing an EAJA application began to run 60 days later, when the time for appealing that order expired. *Id.* at 7a. The court of appeals agreed with the Secretary that the district court's January 30, 1989, order was entered under sentence four of 42 U.S.C. 405(g). It reasoned, however, that this is one of "a subcategory of cases in which the district court makes a fourth sentence remand but intends to retain jurisdiction over the action pending further administrative proceedings and enter a final judgment after those proceedings are completed." *Id.*

at 9a-10a. Because respondent filed his EAJA application within 30 days after the district court entered its post-remand order for entry of final judgment on May 8, 1990, the court of appeals held that his application was timely. *Id.* at 11a.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit acknowledged that its ruling in this case conflicts with *Luna* v. *Department of HHS*, 948 F.2d 169 (5th Cir. 1991). See App., *infra*, 10a. There, the Fifth Circuit held that the EAJA filing period begins to run when the time for appealing a sentence four remand order expires, even if the district court expressly purports to retain jurisdiction pending completion of proceedings on remand. This issue warrants review, because of its recurring nature and the circuit conflict.

We have recently filed a petition for a writ of certiorari in a case from the Eighth Circuit presenting the same issue. *Sullivan* v. *Schaefer*, petition for cert. pending, No. 92-311 (filed August 17, 1992).[2] We argue in *Schaefer* that under this Court's decisions in *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), and *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157, 2165 (1991), the 30-day period for filing an EAJA application in any case involving a remand under sentence four of 42 U.S.C. 405(g) begins to run when the remand order becomes "not appealable," 28 U.S.C. 2412(d)(2)(G)—*i.e.*, upon expiration of the 60-day period allowed by Fed. R. App. P. 4(a)(1) for appealing the remand order. Because that conclusion is, in our view,

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[2] In its unpublished decision in *Schaefer*, the Eighth Circuit adhered to its prior ruling on the timeliness issue in *Welter* v. *Sullivan*, 941 F.2d 674 (8th Cir. 1991).

so clear—and because the Court has so recently and thoroughly considered the operation of 42 U.S.C. 405 (g) and EAJA in this setting—we have urged the Court to summarily reverse the judgment of the Eighth Circuit in *Schaefer*.[3] The petition in this case should be held and disposed of as appropriate in light of the Court's disposition of *Schaefer*.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of *Sullivan* v. *Schaefer*, petition for cert. pending, No. 92-311 (filed August 17, 1992).

Respectfully submitted.

KENNETH W. STARR
Solicitor General

AUGUST 1992

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[3] We have furnished counsel for respondent with a copy of our certiorari petition in *Schaefer*.

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 90-4198 & 91-4009

JOEY V. GUTIERREZ, PLAINTIFF-APPELLANT/
CROSS-APPELLEE,

v.

LOUIS W. SULLIVAN, M.D., Secretary
of Health and Human Services,
DEFENDANT-APPELLEE/
CROSS-APPELLANT.

[Filed Jan. 2, 1992]

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF UTAH
(D.C. No. 88-C-331-A)

Before McKAY, Chief Judge, EBEL, Circuit Judge, and SAFFELS,** District Judge.

SAFFELS, District Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir.

** Honorable Dale E. Saffels, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff Joey Gutierrez appeals the district court's Order of September 25, 1990, denying his request for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412 (EAJA). *Gutierrez v. Sullivan*, 745 F. Supp. 665 (D. Utah 1990). Defendant Secretary of Health and Human Services cross-appeals the district court's Order of April 18, 1990, rejecting the Secretary's argument that Plaintiff's motion for attorney's fees was untimely. *Gutierrez v. Sullivan*, 734 F. Supp. 969 (D. Utah 1990). Because the Secretary's cross-appeal raises a jurisdictional issue, we must address it first.

I.

Plaintiff applied for and was denied social security benefits at the administrative level. He then commenced an action in district court seeking review of the Secretary's denial of benefits. Upon review, the district court concluded that the Secretary had failed to consider evidence relating to Plaintiff's mental impairment and had either misunderstood or misapplied an evaluation made by Dr. Ghicadus, a psychiatrist. The district court remanded the case to the Secretary for further review, by Order dated January 30, 1989.

After further agency proceedings, an ALJ recommended that the Secretary award Plaintiff benefits. The Appeals Council adopted this recommendation, which became the final decision of the Secretary, on May 8, 1989. On December 12, 1989, Plaintiff filed a Motion for Entry of Final Judgment and Award of Attorney's Fees Under the Equal Access to Justice Act. The Secretary objected to Plaintiff's Motion, ar-

guing that the final decision of the Secretary on May 8, 1989, constituted final judgment in the action, so Plaintiff's application for fees was untimely. A request for attorney's fees under the EAJA must be filed with the court "within thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B).

The district court rejected the Secretary's argument, and ruled that "final judgment" for purposes of the EAJA meant a final order by a court, not a final decision by an agency. *Gutierrez*, 734 F. Supp. at 971. The court further ruled that "[a]t present, this court is unable to enter final judgment because the Secretary has yet to file any modified findings of fact and decision with the court as required by 42 U.S.C. § 405(g)." *Id.* at 969. Thereafter, the Secretary filed with the court a copy of his final decision awarding Plaintiff benefits and moved for entry of final judgment. The district court entered an Order for Entry of Final Judgment on May 8, 1990, and Plaintiff renewed his motion for attorney fees under the EAJA on June 4, 1990. The district court denied the request for fees on the ground that the Secretary's position was substantially justified. *Gutierrez*, 745 F. Supp. at 668.

While these appeals were pending, the Supreme Court issued an opinion addressing "whether an administrative decision rendered following a remand from the District Court is a 'final judgment' within the meaning of EAJA." *Melkonyan v. Sullivan*, 111 S. Ct. 2157, 2159 (1991). The Court rejected the same argument advanced by the Secretary here, and concluded that "a 'final judgment' for purposes of 28 U.S.C. § 2412(d)(1)(B) means a judgment rendered by a court that terminates the civil action for which

EAJA fees may be received. The 30-day EAJA clock begins to run after the time to appeal that 'final judgment' has expired." *Id.* at 2162.

The Court went on to discuss whether the district court had entered a final judgment in the case and, if not, whether either party was entitled to return to the district court for entry of a final judgment. *Id.* at 2162-63. The Court determined that "[t]he answer depends on what kind of remand the District Court contemplated." *Id.* at 2163.

Based on its rulings in *Sullivan v. Finkelstein*, 110 S. Ct. 2658 (1990), the Court held that only two types of remands are available under the Social Security Act. *Melkonyan*, 111 S. Ct. at 2164. The first type is under the fourth sentence of 42 U.S.C. § 405(g), which provides: "The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." *Melkonyan*, 111 S. Ct. at 2164. The second type is under the sixth sentence, which provides:

> The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or

> his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.

42 U.S.C. § 405(g); *Melkonyan*, 111 S. Ct. at 2164.

Dividing remand orders into two categories, the Court concluded, "harmonizes the remand provisions of § 405(g) with the EAJA requirement that a 'final judgment' be entered in the civil action in order to trigger the EAJA filing period." *Melkonyan*, 111 S. Ct. at 2165.

> In sentence four cases, the filing period begins after the final judgment ("affirming, modifying, or reversing") is entered by the court and the appeal period has run, so that the judgment is no longer appealable. See [28 U.S.C.] § 2412(d)(2)(G). In sentence six cases, the filing period does not begin until after the postremand proceedings are completed, the Secretary returns to court, the court enters a final judgment, and the appeal period runs.

Id. at 2165.

The district court in *Melkonyan* had remanded the action to the Secretary on the Secretary's motion for reconsideration in light of new evidence without deciding the merits of the pending motions for summary judgment. *Id.* at 2160, 2163. The district court, however, had not made a finding of good cause for the remand. *Id.* at 2165. Because the district court's order did not exactly meet the requirements of the sixth sentence of section 405(g), the Court was uncertain

whether the district court intended to enter a sixth sentence remand or do something else, such as dismiss the case under Fed. R. Civ. P. 41(a). *Melkonyan*, 111 S. Ct. at 2165. The Court, therefore, vacated the decision of the appellate court and remanded the action with directions to remand the case to the district court to clarify its order. *Id.* at 2165, 2166.

Both parties here had an opportunity to submit briefs addressing the effect of *Melkonyan* on the issues presented by the Secretary's cross-appeal. The Secretary argues in his brief that Plaintiff's application for fees was untimely because the district court's remand order of January 30, 1989, was entered pursuant to the fourth sentence of 42 U.S.C. § 405(g) and constituted a final judgment within the meaning of the EAJA. Thus, under the Secretary's theory, the time for filing an application for fees ended on April 30, 1989, at the expiration of the 60-day appeal period in Fed. R. App. P. 4(a) plus the 30-day limitations period in 28 U.S.C. § 2412(d)(1)(B). Plaintiff, on the other hand, argues that his application for fees was timely because the district court's remand was made pursuant to the sixth sentence of 42 U.S.C. § 405(g). Therefore, the district court did not enter final judgment until May 8, 1990, after the Secretary returned to the district court and filed his amended findings and decision.

We reject Plaintiff's contention that the district court's Order constituted a sixth sentence remand. The sixth sentence of section 405(g) does not contemplate a remand for the purpose of hearing additional evidence or making additional findings of fact when the district court has found that the Secretary's position is not supported by substantial evidence or that the Secretary applied the wrong legal standards.

Rather, "[t]he sixth sentence of § 405(g) plainly describes an entirely different kind of remand, appropriate when the district court learns of evidence not in existence or available to the claimant at the time of the administrative proceeding that might have changed the outcome of that proceeding." *Finkelstein*, 110 S. Ct. at 2664.

On the other hand, we do not accept the Secretary's assertion that the district court's remand order necessarily constituted a final judgment within the meaning of the EAJA. The district court apparently intended to retain jurisdiction over the action pending the remand to the Secretary and to enter final judgment after the administrative proceedings were completed. The Supreme Court addressed such a situation in *Sullivan v. Hudson*, 490 U.S. 877 (1989).

In *Hudson*, the court of appeals directed that the district court remand the action to the Secretary for reconsideration after concluding that the Secretary failed to follow the applicable regulations. *Id.* at 880-81. After further administrative proceedings, the Secretary awarded the claimant benefits. The issue before the Supreme Court was whether the claimant could recover under the EAJA the attorney's fees he incurred during the administrative proceedings conducted pursuant to the remand. *Id.* at 879.

The Supreme Court ultimately concluded that a court could award fees under the EAJA for representation on remand if the Secretary's position were not substantially justified and the court concluded that the representation was necessary to carry out the court's mandate and to vindicate the claimant's rights. *Id.* at 890. Although the Court's ultimate holding in *Hudson* is not relevant to the issues before this court, its rationale is.

First, the Court noted that when a district court remands a case because the Secretary has made a factual or legal error in evaluating the claimant's claim, "the district court's remand order will often include detailed instructions concerning the scope of the remand, the evidence to be adduced, and the legal or factual issues to be addressed." *Id.* at 885. The Court further noted: "In many remand situations, the court will retain jurisdiction over the action pending the Secretary's decision and its filing with the court. The court retains the power in such situations to assure that its prior mandate is effectuated." *Id.* at 886 (citations omitted).

Next, the Court considered "[t]wo points important to the application of the EAJA [that] emerge from the interaction of the mechanisms for judicial review of Social Security benefits determinations and the EAJA." *Id.* The first point was that when a remand does not dictate the receipt of benefits, the claimant usually cannot attain "prevailing party" status under the EAJA until the administrative proceedings are concluded and the Secretary has modified his earlier decision to award benefits. *Id.* The second point was that an application for fees under the EAJA must be filed "within thirty days of final judgment in the action," 28 U.S.C. § 2412(d)(1)(B), yet "[a]s in this case, there will often be no final judgment in a claimant's civil action for judicial review until the administrative proceedings on remand are complete." *Hudson*, 490 U.S. at 887.

> Thus, for purposes of the EAJA, the Social Security claimant's status as a prevailing party and the final judgment in her "civil action . . . for review of agency action" are often completely dependent on the successful completion of

> the remand proceedings before the Secretary. Moreover, the remanding court continues to retain jurisdiction over the action within the meaning of the EAJA and may exercise that jurisdiction to determine if its legal instructions on remand have been followed by the Secretary.

Id. at 887-88.

Although the Court concluded in *Melkonyan* that "in § 405(g) actions, remand orders must either accompany a final judgment affirming, modifying, or reversing the administrative decision in accordance with sentence four, or conform with the requirements outlined by Congress in sentence six," 111 S. Ct. at 2165, the Court also acknowledged the continuing validity of *Hudson*, which it described as a "case[] where the district court retains jurisdiction of the civil action and contemplates entering a final judgment following the completion of administrative proceedings." 111 S. Ct. at 2162.

The remand in *Hudson* followed a review of the Secretary's decision on the merits, and therefore could not have been a sixth sentence remand. *See Melkonyan*, 111 S. Ct. at 2163 (when making a sixth sentence remand a court "does not rule in any way as to the correctness of the administrative decision"). Because the only types of remand available under the statute are those under the fourth and sixth sentences of section 405(g), *Melkonyan*, 111 S. Ct. at 2164, the remand in *Hudson* must have been made under the fourth sentence of section 405(g).

Thus, we construe the Supreme Court's opinions in *Hudson* and *Melkonyan* as recognizing a subcategory of cases in which the district court makes a fourth sentence remand but intends to retain jurisdiction

over the action pending further administrative proceedings and enter a final judgment after those proceedings are completed. *Accord Welter v. Sullivan*, 941 F.2d 674, 675 (8th Cir. 1991) (holding that district court order remanding actions because Secretary committed legal and factual errors did not constitute final " 'judgment[s] . . . modifying or reversing the decision[s] of the Secretary' " because district court "retained jurisdiction of the claimants' cases and planned to enter dispositive sentence four judgments after the Secretary reevaluated the claimants' applications for benefits"); *see also Damato v. Sullivan*, 945 F.2d 982, 987 (7th Cir. 1991) (holding that remand order that "neither affirmed, modified, nor reversed the decision of the ALJ . . . was not a remand under sentence four of Section 405(g) and cannot constitute a 'final judgment' pursuant to 28 U.S.C. § 2412(d)(2)(G)"); *but see Luna v. United States Dep't of Health & Human Servs.*, No. 90-1685, 1991 WL 245219, at *3 (5th Cir. Nov. 25, 1991) ("Although the district court purported to retain jurisdiction when it remanded, under *Frizzell* [*v. Sullivan*, 937 F.2d 254 (5th Cir. 1991)] and *Finkelstein*, it actually ceded that jurisdiction when it remanded. That order of remand was a 'final judgment' for purposes of the EAJA and section 405(g) . . . .").

The district court here thought that it could not enter final judgment in the action until the Secretary filed his amended findings and decision pursuant to section 405(g). *Gutierrez*, 734 F. Supp. at 969, 971-72. The Supreme Court has since made clear that section 405(g) requires the Secretary to file his modified findings and decision with the district court for its review only when the court's previous remand was under sentence six. *Finkelstein*, 110 S. Ct. at 2664-

65. Although the district court was mistaken in thinking that it *could not* enter final judgment when it remanded the action to the Secretary, the court made clear that it *had not* entered final judgment at the time of its remand order. *Gutierrez*, 734 F. Supp. at 972. Furthermore, after the administrative proceedings were complete and the parties returned to district court, the court entered an order captioned "Order For Entry of Final Judgment" in which it stated: "Based upon the government's Motion for Entry of Final Judgment and good cause appearing therefor, IT IS HEREBY ORDERED that final judgment is entered in the above-captioned case." Order for Entry of Final Judgment, Appellee's Supplemental App. at 9. We conclude, therefore, that the district court intended to retain jurisdiction over the action pending the remand and enter a final judgment in the action only after the administrative proceedings were finished. Because Plaintiff filed his application for attorney's fees within thirty days of the date the court entered its Order for Entry of Final Judgment, the application was timely under the EAJA.

II.

We turn now to the merits of Plaintiff's application for fees. The EAJA requires a court to award fees and other expenses to a prevailing party in a suit against an agency of the United States "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412 (d)(1)(A). The government bears the burden of proving that its position was substantially justified. *Estate of Smith v. O'Halloran*, 930 F.2d 1496, 1501

(10th Cir. 1991). "In this circuit the test for substantial justification is essentially one of 'reasonableness in both law and fact.'" *Fulton v. Heckler*, 784 F.2d 348, 349 (10th Cir. 1986) (quoting *United States v. Community Bank & Trust Co.*, 768 F.2d 311, 314 (10th Cir. 1985)).

"[T]he reasonableness test breaks down into three parts: the government must show 'that there is a reasonable basis . . . for the facts alleged . . .[;] that there exists a reasonable basis in law for the theory it propounds; and that the facts will reasonably support the legal theory advanced.'" *Gatson v. Bowen*, 854 F.2d 379, 380 (10th Cir. 1988) (quoting *United States v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481, 1487 (10th Cir.), *cert. denied*, 469 U.S. 825 (1984)). We consider the reasonableness of the position the Secretary took both in the administrative proceedings and in the civil action plaintiff commenced to obtain benefits. *Fulton*, 784 F.2d at 349.

We review the district court's determination that the Secretary's position was substantially justified under an abuse of discretion standard. *Hadden v. Bowen*, 851 F.2d 1266, 1268 (10th Cir. 1988). We conclude the district court abused its discretion in not awarding Plaintiff attorney's fees.

The evidence before the ALJ established that Plaintiff could not perform his past relevant work. Therefore, the Secretary had the burden of showing that Plaintiff could perform other work in the national economy. *Frey v. Bowen*, 816 F.2d 508, 512 (10th Cir. 1987). The vocational expert testified that Plaintiff could perform certain unskilled, sedentary assembly and simple production line jobs, though she said: "[I]f concentration is a problem and there is reason to expect or suspect this person would have off-task

time, then, again, it would limit that person's ability to do these kinds of jobs. . . . [I]t would be my feeling because we are talking about assembly and fabrication that there would be very little room for off-task time." App. at 150.

The question confronting the ALJ was whether, given Plaintiff's mental impairments and alleged pain, Plaintiff could perform the activities required by the jobs the vocational expert identified, including following, understanding, and remembering simple job instructions, and concentrating on the task at hand. The ALJ found that Plaintiff could follow, understand, and remember simple job instructions; that he did not have significant memory disturbances; that he had the ability to make occupational adjustments; and that "[c]laimant's purported difficulty concentrating or translating written instructions into action does not appear to be supported by intelligence testing, claimant's past relevant successful work experience or successful completion of the tenth grade." *Id.* at 100-03. These findings were not reasonable based on the record before the ALJ.

Plaintiff was tested by a variety of mental health professionals between 1986 and 1987. Dr. Brown, who examined Plaintiff in 1986, noted that Plaintiff had concentration and attention difficulties, and that his perceptual motor functioning was impaired. *Id.* at 166. One of the tests Dr. Brown administered was an object assembly test. Dr. Brown observed that it took Plaintiff sixty seconds to assemble the mannequin, and "[o]nly the head was firmly in place; one arm was in a non-fitting position." *Id.* at 167. Dr. Morse, who examined Plaintiff three times, noted that Plaintiff was "usually confused and ha[d] trouble concentrating." *Id.* at 176.

The only evidence tending to support the ALJ's finding that Plaintiff could concentrate and follow directions adequately to perform the assembly jobs was contained in the report of Dr. Ghicadus, a psychiatrist who examined Plaintiff once in May of 1987. Dr. Ghicadus' report consisted of several pages of narrative, as well as a form entitled "Medical Assessment of Ability to Do Work-Related Activities (Mental)" on which Dr. Ghicadus checked answers and made additional comments.

In the narrative portion of her report, Dr. Ghicadus diagnosed Plaintiff as having psychogenic pain disorder [1] and dysthymic disorder.[2] She stated that she found it "very difficult to separate out what impairment he has that is real, academic or what is due to his (alleged) preoccupation with his somatic problems and his pain. There is so much subjectivity to his complaints." *Id.* at 171.

On the medical assessment form, Dr. Ghicadus indicated that Plaintiff had a "good" ability to follow work rules, relate to coworkers, deal with the public, use judgment, deal with work stresses, function independently, and maintain attention or concentration. *Id.* at 173. In the comment section, however, she

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[1] "The essential feature of [pyschogenic or somataform pain disorder] is preoccupation with pain in the absence of adequate physical findings to account for the pain or its intensity." *Diagnostic & Statistical Manual of Mental Disorders* 264 (3d ed. rev. American Psychiatric Ass'n 1987).

[2] "The essential feature of [dysthymic disorder or dysthymia] is a chronic disturbance of mood involving depressed mood . . . , for most of the day more days than not, for at least two years . . . ." *Diagnostic & Statistical Manual of Mental Disorders* 230 (3d ed. rev. American Psychiatric Ass'n 1987).

wrote: "The above responses are theoretical; how he would react if he were pain free and able to work. I think he is into a mode of relentless 'pain' that would preclude his working, hence his capabilities above are moot." *Id.*

Dr. Ghicadus also indicated that Plaintiff's ability to understand, remember and carry out complex, or detailed, or simple job instructions was "poor or none." *Id.* at 172. She then commented: "It is his professed response that he cannot do this. His memory responses on mental status would indicate he *could* or *does have* sufficient memory recall to handle simple job instructions." *Id.*

Finally, Dr. Ghicadus indicated that Plaintiff's ability to maintain his personal appearance and demonstrate reliability was "fair" and that his ability to behave in an emotionally stable manner and relate predictably in social situation was "poor or none." *Id.* She commented, however: "Only the patient's personal response & feeling he would react in this manner. It is difficult to extrapolate how one feels he would react if he had no preoccupying pain syndrome." *Id.*

The problem with Dr. Ghicadus' report is that it improperly tries to separate Plaintiff's pain from his ability to do work-related activities. Thus, while there are some statements in the report that support the ALJ's findings, the report as a whole reflects that if one takes into account Plaintiff's mental impairments, including his psychogenic pain disorder, he could not make the occupational, performance, or social adjustments necessary to do the activities required by the jobs the vocational expert identified.

Furthermore, there was no evidence that Plaintiff had the same impairments when he completed the

tenth grade or performed his past relevant work. Therefore, the ALJ's reliance on his ability to do those activities as evidence of his present ability to concentrate and follow directions was unreasonable.

Because the position of the Secretary was not reasonable in fact, it was not substantially justified. The district court, therefore, erred in denying Plaintiff's request for attorney's fees under the EAJA. Plaintiff asked that the district court award him fees at the rate of $100.00 per hour rather than the statutory rate of $75.00 per hour. *See* 28 U.S.C. § 2412 (d)(2)(A). Because the district court denied the fee request entirely, it did not consider whether an increased hourly fee would be appropriate under the statute. *See id.* ("[A]ttorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."). In their briefs before the district court, the parties disputed whether an increase in fees was appropriate. Under the circumstances, we conclude the issue is best determined by the district court in the first instance. Accordingly, we remand the action to the district court to calculate the appropriate amount of attorney's fees.

The judgment of the United States District Court for the District of Utah is AFFIRMED in part, REVERSED in part, and the action is REMANDED for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. 88-C-0331A

JOEY GUTIERREZ, PLAINTIFF,

vs.

LOUIS SULLIVAN, Secretary of Health and Human Services, DEFENDANT.

[Filed Apr. 18, 1990]

ORDER

I. INTRODUCTION

Before the court is plaintiff's motion for entry of final judgment and award of attorneys fees. The court heard oral argument on these motions on February 20, 1990, and took the motions under advisement.

Plaintiff, Joey Gutierrez, originally filed a complaint with this court contesting a decision of the Secretary of Health and Human services denying him disability insurance and supplemental income benefits under the Social Security Act. Finding that the Secretary had not met his burden of proof in showing that plaintiff had the capacity to perform other jobs in the national economy, the court remanded the case

to the Secretary of Health and Human Services for further review. Subsequently, on June 8, 1989, the Appeals Council issued its final decision that plaintiff was disabled under Titles II and XVI of the Social Security Act. On July 18, 1989, the Secretary forwarded to plaintiff's counsel a signed Stipulation and Order of Dismissal. Plaintiff did not sign the stipulation, but, on December 12, 1989, filed a motion for entry of final judgment and award of attorney's fees. Potentially at issue in this case is: (1) whether the application for attorney's fees was timely filed; (2) whether the government's position in the initial litigation was sustantially justified; (3) whether an enhancement of the $75.00 per hour maximum in attorney's fees is justified by cost of living increases since 1981; and (4) whether the number of hours claimed by the plaintiff's attorneys is reasonable. A decision as to the above issues must be postponed, however, until this court enters a final judgment in this case. At present, this court is unable to enter final judgment because the Secretary has yet to file any modified findings of fact and decision with the court as required by 42 U.S.C. § 405(g).

II. ANALYSIS

The Equal Access to Justice Act (EAJA) allows the prevailing party in a civil suit to recover attorney's fees against the United States whenever the government's position in the original litigation was not substantially justified. 28 U.S.C. § 2412(d)(1)(A) (1989).[1] The EAJA statutorily requires

[1] Section 2412(d)(1)(A) of the EAJA provides:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the

that a petition for attorney's fees be filed within thirty days of final judgment in the action. 28 U.S.C. § 2412(d)(1)(B) (1989).[2] This requirement is a " 'mandatory jurisdictional condition' " and "[f]ailure to submit the application within 30 days bars an award" under the EAJA. *Olson v. Norman*, 830 F.2d 811, 821 (8th Cir. 1987) (citations omitted); *see also Vibra-Tech Engineers, Inc. v. United States*, 787 F.2d 1416, 1419 (10th Cir. 1986) (noting that the "EAJA constitutes a waiver of sovereign immunity and must be construed strictly").

Defendant claims that plaintiff's fee request was untimely. Defendant claims that the "final judgment" occurred on June 8, 1989 when the Appeals Council issued its final decision that plaintiff was disabled under Titles II and XVI of the Social Security

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> United States fees and other expenses, in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (1989).

[2] Section 2412(d)(1)(B) provides in pertinent part:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an aplication for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award . . . , and the amount sought, including an itemized statement . . . stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not substantially justified.

28 U.S.C. § 2412(d)(1)(B) (1989).

Act. Because plaintiff's request for attorney's fees was not filed until December 12, 1989, a full six months after "final judgment," defendant argues that the thirty-day period for filing expired, and thus plaintiff's claim is barred. Plaintiff, on the other hand, claims that a "final judgment" has yet to occur in this case. Plaintiff contends that the Appeals Council's final decision was not a "final judgment" as defined by the EAJA. Plaintiff further contends that the term "final judgment" in the EAJA contemplates a final order by this court to commence the thirty-day filing period. Thus, the issue before the court is whether the term "final judgment" contemplates a final order by this court or whether the final decision of the Appeals Council is sufficient to constitute a "final judgment."

The EAJA, as amended in 1985, defines "final judgment" as "a judgment that is final and not appealable, and includes an order of settlement." 28 U.S.C. § 2412(d)(1)(C)(2)(g) (1989). Though this language, at first glance, appears to be clear, federal courts are split as to its application.

The most recent case to deal with the application of the term "final judgment" was *Melkonyan v. Heckler*, 895 F.2d 556 (9th Cir. 1990). The facts of the instant case closely parallel those in *Melkonyan*. In Melkonyan the plaintiff moved for attorneys fees more than a year after a favorable decision by the Appeals Council. The Ninth Circuit held that the final decision of the Appeals Council was the "final judgment" contemplated by the EAJA. The Ninth Circuit further held that the period for filing attorneys fees began to run immediately upon the Appeals Council's decision, because that order was not appealable. The court noted:

> The decision by the Appeals Council constitutes the final decision of the Secretary. *Sullivan v. Hudson*, 109 S. Ct. 2248, 2252 (1989). Section 405(g) entitles only an "individual" to appeal the Secretary's decision. *Jones v. Califano*, 576 F.2d 12, 18 (2d Cir. 1978). Thus, the Secretary would not have standing or reason to complain of his own final decision. Likewise, if a claimant wholly prevails on his claim, he would have no reason to appeal that decision.

Id. at 558. Because the plaintiff did not file his motion for attorneys fees within 30 days of the Appeals Council's decision, the Ninth Circuit held that his motion was untimely, and thus barred. *See also Wagaman v. Bowen*, 698 F. Supp 187 (D.S.D. 1988) (holding in accord with *Melkonyan*).

The result in *Melkonyan*, however, is inconsistent with other case law and with the legislative history of the 1985 amendments to the EAJA. The most persuasive case in opposition to the holding in *Melkonyan* is *Guthrie v. Schweiker*, 718 F.2d 104 (4th Cir. 1983). The facts in *Guthrie* closely mimic the facts in *Melkonyan* and those of the case presently before the court. The Fourth Circuit, however, held that "the procedure set forth in 42 U.S.C. § 405(g) contemplates additional action both by the Secretary and a district court before a civil action is concluded following a remand." *Id.* at 106; *see also Thompson v. Sullivan*, 715 F.Supp 1019 (D.Kan. 1989). Thus, the "final judgment" requirement was not satisfied until the district court entered such an order. The *Guthrie* court remanded the matter to the district court and ordered it to direct the Secretary to file

the papers required by § 405(g).[3] The district court could then enter a "final judgment" and the plaintiff could reapply for attorneys fees.

The Ninth Circuit in *Melkonyan* acknowledged the *Guthrie* decision, but found that it had been legislatively overruled. *Melkonyan* noted that *Guthrie* was decided before the 1985 EAJA amendment which redefined the term "final judgment" as "a judgment that is final and not appealable." *Melkonyan*, 895 F.2d at 559, *quoting* 28 U.S.C. § 2412(d)(2)(G). The Ninth Circuit found that *Guthrie* was inconsistent with the amended language of the statute, and thus, refused to follow the Fourth Circuit's holding. The Ninth Circuit's conclusion, however, that *Guthrie* has been legislatively overruled, appears implausible in light of the legislative history of the 1985 amendments to the statute.

The legislative history of the 1985 amendments to the EAJA explicitly follows the Fourth Circuit's holding in *Guthrie*. The legislative history states that neither the judicial remand to the agency nor the agency decision after remand constitutes final judgment. H.R. Rep. No. 120, 99th Cong., 1st Sess., pt. 1 at 19-20 (1985), *reprinted in* 2 1985 U.S. Code Cong. & Admin. News 132, 148 (1985), *citing Guthrie*. Had Congress intended to overrule the result in *Guthrie*, it certainly would not have cited *Guthrie* with approval in the legislative history. In

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[3] 42 U.S.C. § 405(g) states in pertinent part:

> the Secretary shall, after the case is remanded, . . . file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.

42 U.S.C. § 405(g).

fact, the legislative history strongly implies that Congress intended that courts continue to follow *Guthrie*. Furthermore, the legislative history to 28 U.S.C. section 2412(d)(2)(G) states that "[t]his section should not be used as a trap for the unwary resulting in the unwarranted denial of fees." *Id.* at 146 n.26. Indeed, a result contrary to the legislative history would present a trap for the unwary who relied on its authority when filing for attorneys fees.

Additionally, the Supreme Court recently cited with approval *Guthrie's* holding, that "final judgment" requires district court action. *See Sullivan v. Hudson*, 109 S. Ct. 2248, 2255 (1989). Because the Supreme Court decided *Hudson* after the 1985 amendments, it is strong evidence that *Guthrie* has not been overruled.

In applying the holding in *Guthrie* to the present case, it is clear that a "final judgment" has not yet been rendered. Both *Guthrie* and the legislative history to 28 U.S.C. section 2412(d)(2)(G) require the district court to enter a "final judgment" after the decision of the Appeals Council, after which the filing period for attorneys fees will start to run. Before the court can enter "final judgment" in this case the Secretary must file with the court those documents required by 42 U.S.C. § 405(g). The court will then review those documents and enter "final judgment," after which the plaintiff may renew his motion for attorneys fees under the EAJA. Therefore, the court orders the defendant to file with this court the documents required by 42 U.S.C. § 405(g), so that "final judgment" may be entered.

IT IS SO ORDERED.

DATED this 18th day of April, 1990.

BY THE COURT:

/s/ Aldon J. Anderson
ALDON J. ANDERSON
United States Senior Judge

APPENDIX C

UNITED STATES DISTRICT COURT
D. UTAH, C.D.

No. 88-C-0331A

JOEY GUTIERREZ, PLAINTIFF

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

Sept. 25, 1990

ORDER DENYING PLAINTIFF'S MOTION FOR AWARD OF ATTORNEY'S FEES

ALDON J. ANDERSON, Senior District Judge.

I. Introduction

Before the court is plaintiff's motion for award of attorney's fees. The court heard oral argument on this motion on August 3, 1990 and took the motion under advisement. Because the decision of the Secretary denying disability benefits was substantially justified, plaintiff is not entitled to an award of attorney's fees and the motion must be denied.

II. Factual Background

Plaintiff, Joey Gutierrez, filed a complaint with this court contesting a decision of the Secretary of Health and Human Services (the "Secretary") denying his claim for disability and supplemental income benefits under the Social Security Act. Finding that the Secretary had not met his burden of proof in showing that the plaintiff had the capacity to perform other jobs in the national economy, the court remanded the case to the Secretary for further review. Subsequently, on June 8, 1989, the Appeals Council issued its final decision that plaintiff was disabled under Titles II and XVI of the Social Security Act and was entitled to receive benefits. On December 12, 1989, plaintiff filed a motion for entry of final judgment and award of attorney's fees. On May 8, 1990, this court entered an order for final judgment which allowed plaintiff to renew his motion for award of attorney's fees. The issue was briefed by the parties and the court heard oral argument on the motion.

III. Analysis

The Equal Access to Justice Act, 28 U.S.C. § 2412 (1982), (hereinafter "EAJA") provides for the award of attorney's fees to a private litigant who prevails in a civil action against the United States. Specifically, 28 U.S.C. § 2412(d)(1)(A) (1982) provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of

> agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

A position is substantially justified if it is " 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 2549, 101 L.Ed.2d 490 (1988). This standard may also be described as a "reasonable basis both in law and fact." *Id.* However, "a position can be justified even though it is not correct, and . . . it can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Id.* at 566 n. 2, 108 S.Ct. at 2550 n. 2. The burden of proof "rests with the government to prove that it was substantially justified in arguing that the denial of benefits was supported by substantial evidence." *Kemp v. Bowen*, 822 F.2d 966, 967 (10th Cir. 1987).

A position may be substantially justified even though it was not supported by substantial evidence. If this were not the case, there would be "an automatic award of attorney's fees in all social security cases in which the government was unsuccessful on the merits." *Hadden v. Bowen*, 851 F.2d 1266, 1269 (10th Cir.1988). Reasoning that such an automatic award of fees under the EAJA would be contrary to the intent of Congress, the Tenth Circuit has adopted the majority rule "that a lack of substantial evidence on the merits does not necessarily mean that the government's position was not substantially justified." *Id.* at 1269.

Plaintiff originally alleged he was disabled as a result of back problems (R. 188, 193), but during the course of the evaluation, it became apparent that he was also mentally impaired. (R. 124-25, 126-28). Plaintiff was granted a hearing before an Administrative Law Judge ("ALJ") to evaluate the merits of his claim. After evaluating plaintiff's medical reports and after having orally examined plaintiff, the ALJ issued a decision dated August 20, 1986 finding that plaintiff was not disabled. Plaintiff appealed this decision to the Appeals Council and was granted another hearing before a different ALJ. At that hearing, the ALJ considered considerable evidence on the plaintiff's mental impairment in relation to his ability to work. The ALJ found that while plaintiff was impaired, he had sufficient residual capacity to perform certain sedentary jobs with a low stress level. The ALJ then ask hypothetical questions of a vocational specialist to determine the availability of jobs for

> a male individual 34 to 37 years of age, with a tenth grade education and past "unskilled," "medium" level exertion as a sandblaster, and the residual functional capacity for "sedentary" exertion and specified work placement in a structured environment not requiring independent judgments and a good deal of supervision.

(R. 19). Relying on the testimony of the vocational specialist that there was a significant number of such jobs in the national economy which such an individual could perform, the ALJ issued a decision dated August 31, 1987 again finding that plaintiff was not disabled. (R. 15). The use of such hypothetical questions in such a hearing is not improper and may be an effec-

tive means of examination. An ALJ may rely on the responses of vocational specialists to such hypothetical questions to make a determination that a claimant is not disabled even if the questions do not fully itemize all of the disabilities alleged by the claimant. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986).

In reviewing the Secretary's decision to deny disability benefits, this court determined that the Secretary had failed to meet his burden in showing there was a significant number of jobs in the national economy which plaintiff could perform. The court found that the ALJ properly evaluated all relevant evidence in making his determination that the pain plaintiff was suffering was not disabling. With regard to plaintiff's mental impairment, however, the court found that the ALJ did not fully take into account the evidence relating to the plaintiff's mental impairment, and that certain evidence was either misunderstood or misapplied.

Specifically, the court found that the ALJ did not properly consider the medical report of Dr. Ghicadus concerning the plaintiff's ability to understand, remember and carry out simple job instructions. In his report Dr. Ghicadus wrote of the plaintiff:

> When questioned directly about his ability to remember job instructions, detailed, complex etc. he says he could not do this, but seems to represent a rather generic negative response and to further the characterization of his being disabled. However, his responses on the mental status would belie the notion that he has significant memory disturbance. It is very difficult to separate out what impairment he has that is real, academic or what is due to his (alleged)

> preoccupation with his somatic problems and his pain. There is so much subjectivity to his complaints.

(R. 360-61). On a standardized form, Dr. Ghicadus placed an "X" on a line indicating the plaintiff had poor or no ability to understand, remember and carry out simple job instructions. Yet, Dr. Ghicadus qualified this response with the following handwritten comment:

> It is his professed response that he cannot do this [understand, remember, and carry out simple instructions]. His memory responses on mental status would indicate he *could* or *does have* sufficient memory recall to handle simple job instructions.

(R. 362, emphasis in original). Thus, the report of Dr. Ghicadus itself raised serious questions about the extent of the plaintiff's mental impairment. The ALJ had the opportunity at the hearing to ask questions of plaintiff and to observe his responses and demeanor. The ALJ carefully considered all of the evidence and included numerous references in his report supporting his decision. The court is convinced that the ALJ's decision was supported by evidence sufficient to allow a reasonable person to believe the decision was supported by substantial evidence. *Compare Martinez v. Secretary of Health & Human Services*, 815 F.2d 1381, 1383 (10th Cir. 1987) (government was substantially justified in denying disability benefits where there were conflicting district court interpretations of the proper medical improvement standard); *Albrecht v. Heckler*, 765 F.2d 914, 916 (9th Cir.1985) (government was substantially justified where some evidence

existed supporting decision to deny benefits) *with Weakley v. Bowen*, 803 F.2d 575, 579 (10th Cir. 1986) (government was not reasonable in arguing that there was substantial evidence that surgery would restore claimant's ability to work); *Kemp v. Bowen*, 822 F.2d 966, 967 (10th Cir.1987) (government was not substantially justified where ALJ totally rejected all evidence provided by claimant's treating physician and rejected diagnosis in the face of all medical evidence to the contrary); *Fulton v. Heckler*, 78 F.2d 348 (10th Cir.1986) (government was not substantially justified where the only evidence supporting the denial of benefits was a report which conflicted with other medical opinions, with the testimony at the hearing, and with the history of the claimant's illness and treatment).

IV. Conclusion

This was not a case in which the Secretary's decision to deny benefits was clearly incorrect. On the contrary, the decision appears to have been reasonable, but was not supported by substantial evidence. The burden was on the Secretary to show that there was a significant number of jobs in the national economy which plaintiff could perform given his physical and mental impairments. Not finding substantial evidence to support the Secretary's decision, the court remanded the case for reconsideration of the evidence but did not make a determination that the decision itself was incorrect, only that it was unsupported by substantial evidence.

Given the evidence concerning plaintiff's ability to work, including the testimony of the vocational specialist that a significant number of jobs existed in the national economy which plaintiff could perform,

the position of the Secretary in denying plaintiff benefits under the Social Security Act was substantially justified or "justified in the main." *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 2549, 101 L.Ed.2d 490 (1988). Therefore, plaintiff's claim for attorney's fees does not meet the statutory requirements of the EAJA and the motion for the award of attorney's fees must be denied.

IT IS SO ORDERED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. 88-C-0331A

JOEY V. GUTIERREZ, PLAINTIFF,

vs.

OTIS BOWEN, in his capacity as Secretary of Health & Human Services, DEFENDANT.

[Filed Jan. 30, 1989]

ORDER

The plaintiff, Joey V. Gutierrez, contests a decision of the Secretary of Health and Human Services denying him disability insurance and supplemental income benefits under the Social Security Act. The matter came before the court on the Secretary's Motion to Affirm the Administrative Decision and plaintiff's Motion to Reverse or Remand.

The case was referred to the magistrate under 28 U.S.C. § 636(b)(1)(B), with a request that he recommend whether the administrative decision be affirmed, reversed or remanded to the Secretary for further review. On November 14, 1988, the magistrate recommended that this action be remanded to the Secretary for further vocational evidence and findings regarding plaintiff's mental state or capacity to work.

On November 30, 1988, the court inadvertently entered an order to remand this case to the Secretary although the response time allowed for objection to the Report and Recommendation had not elapsed. The government filed a motion under Federal Rule of Civil Procedure 59(e) to alter or amend the November 30, 1988 order. Pursuant to the government's request, the court hereby vacates the earlier order to remand.

However, further review of the magistrate's Report and Recommendation, the government's objections to the magistrate's report, and plaintiff's response to the government's objections, dictates that the court once again agree with the magistrate's Report and Recommendation and remand this action to the Secretary for further review.

FACTUAL BACKGROUND

Plaintiff applied for benefits on July 12, 1985, alleging disability due to spinal and mental impairments and pain. After a hearing decision, the Appeals Council remanded the case to an administrative law judge (ALJ) for additional consideration of the plaintiff's mental impairment. The ALJ determined that the plaintiff has dorsal kyphosis, status post-compression fractures of the spine, psychogenic pain disorder and borderline intellectual functioning, but that these impairments do not equal any impairment that establishes disability. The ALJ found that although the plaintiff could not return to his past work as a sandblaster, he retained the ability to perform sedentary work in a low stress environment involving simple one or two step instructions.

The plaintiff argues that the ALJ's findings were not supported by substantial evidence in finding that

he retains the capacity for sedentary work. He specifically claims that the ALJ ignored the evidence of plaintiff's pain and mental impairment in rendering his findings.

DISCUSSION

The Secretary uses a five-step process, found in 20 C.F.R. § 404.1520(a), to evaluate disability claims. These evaluation is [*sic*] as follows: (1) a person working is not disabled; (2) a person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work activities is not disabled; (3) a person whose impairment meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled;[1] (4) a person who is able to perform work he has done in the past is not disabled; and (5) a person whose impairment precludes performance of past work is disabled unless the secretary demonstrates that the person can perform other work. Regarding the fifth step, the Secretary considers factors such as age, education, past work experience, and residual functional capacity. *See Reyes v. Bowen*, 845 F.2d 242, 243 (1988).

The claimant must establish a *prima facie* case of disability by showing that he is not presently working and has one or more impairments which are so severe that they prevent him from engaging in his previous employment. *Id.* at 243. Once such a showing is made, "the burden passes to the Secretary to show that the claimant retains the ability to do other work activity and that jobs the claimant could per-

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[1] These impairments are found in 20 C.F.R. § 404, Subpart P, Appendix 1.

form exist in the national economy." *Id. See also Frey v. Bowen*, 816 F.2d 508, 512 (10th Cir. 1987). If the secretary does not meet this burden, the claimant is considered disabled and benefits are awarded. *Reyes v. Bowen*, 845 F.2d at 243.

Plaintiff has established the prima facie case in that he has not working [*sic*] and has shown (and the ALJ has found) that he is unable to go back to his previous work as a sandblaster. The ALJ found, however, that plaintiff retains the ability to perform sedentary work in a low stress environment involving simple one or two step instructions. Plaintiff argues that this finding is not supported by substantial evidence and ignores the evidence of plaintiff's pain and mental impairment in rendering his findings.

It is apparent from the record that the ALJ properly evaluated all relevant evidence in making his determination that the pain plaintiff is suffering from is not disabling. Plaintiff was taking only mild pain medications and did not appear uncomfortable while being examined by physicians. Further, plaintiff testified that he had lifted ten pounds within the past month.

It is also apparent, however, that the ALJ did not fully take into account the evidence relating to the plaintiff's mental impairment. The ALJ, based on a psychiatric evaluation by Dr. Ghicadus, concluded that plaintiff's low level of mental ability was "apparently due to . . . professed negative responses rather than any evidence on mental status evaluation."

This conclusion appears contrary to the evidence and evaluation done by Dr. Ghicadus. Dr. Ghicadus indicated that the plaintiff had "poor or [no] ability

to understand, remember, and carry out even simple job instructions." (R. 362). He found that although plaintiff has the IQ or memory recall to perform simple tasks, his psychiatric illness (psychogenic pain & dysthymic disorders) put him "into a mode of relentless pain that would preclude his working." (R. 363). Dr. Ghicadus' evaluation was uncontradicted by other evidence or testimony. Thus, the evidence suggests that the ALJ either misunderstood or misapplied the evaluation made by Dr. Ghicadus. In any event, the Secretary has yet to meet his burden of proof in showing that plaintiff has the capacity to perform other jobs in the national economy.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the case be remanded to the Secretary of Health and Human Services for further review consistent with this order and the Magistrate's Report and Recommendation.

DATED this 30 day of January, 1989.

BY THE COURT

/s/ Aldon J. Anderson
ALDON J. ANDERSON
United States Senior Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 90-4198, 91-4009

JOEY V. GUTIERREZ, PLAINTIFF-APPELLANT/CROSS-APPELLEE,

v.

LOUIS W. SULLIVAN, Secretary of Health and Human Services, DEFENDANT-APPELLEE/CROSS-APPELLANT.

AMENDED ORDER

Filed May 28, 1992

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, KELLY, Circuit Judges, and SAFFELS, District Judge.*

By reason of clerical error appellee/cross-appellant's timely petition for rehearing and suggestion for rehearing en banc was submitted to the hearing

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* Honorable Dale E. Saffels, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

panel and denied as untimely without submission to the full court. See 10th Cir. R. 35.3. The petition and suggestion have now been resubmitted to the full court and the order of April 30, 1992, is amended as follows:

Appellee/Cross-appellant's petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on hearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER,
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 90-4198
91-4009

JOEY V. GUTIERREZ, PLAINTIFF-APPELLANT/
CROSS-APPELLEE

v.

LOUIS W. SULLIVAN, M.D. SECRETARY OF HEALTH
AND HUMAN SERVICES, DEFENDANT-APPELLANT/
CROSS-APPELLANT

ORDER

Filed April 30, 1992

Before MCKAY, Chief Judge, EBEL, Circuit Judges, and SAFFELS, District Judge.*

This matter comes on for consideration of appellee/cross-appellant's untimely petition for rehearing and suggestion for rehearing en banc.

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* Honorable Dale E. Saffels, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

Upon consideration whereof, it is ordered that the petition for rehearing is denied as untimely.

Entered for the Court

ROBERT L. HOECKER
Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

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